

COUNTY OF KAUAI  
OFFICE OF THE COUNTY ATTORNEY

July 21, 2006

TO: Charter Review Commission  
c/o Curtis Shiramizu, Esq.

FROM: Lani Nakazawa  
County Attorney 

SUBJECT: County Manager Ballot Issue

You have asked for my comments on proposed ballot language concerning the County Manager issue. Below are my comments. Please be aware that the comments are offered in conjunction with my duty to review ballot language with the proposers of the language. As such, the comments do not constitute an opinion and are not binding on my Office and the County. Further, by providing these comments, I am not waiving any objections or other challenges to this proposal (not mentioned in these comments) that may be made by the County, including its Elections Division.

The proposed ballot language is as follows:

"Shall there be appointed by the County Council a County manager who shall, effective upon the expiration of the term of the Mayor in 2010, succeed to all of the powers of the Mayor stated in Sections 3.07E, 3.08, 4.03, 6.01, 6.03, 6.04, 6.05, 7.05 and 23.02 of the Kaua'i County Charter and shall the County Council enact by ordinance such other matters as to the appointment compensation, removal, powers and duties of the County Manager not inconsistent with the foregoing and as to the status, powers and duties of the Mayor following the activation of the County Manager as the Council deems necessary or desirable."

This language is not appropriate for placement on the ballot for the following reasons.

1. Lack of transparency – The ballot question must be in a form which produces a knowing and deliberate expression of voter choice, so that the vote satisfies the requirements of electoral approval. Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979). The Kahalekai case reaffirmed the proposition, common across jurisdictions, that the electorate must be sufficiently informed of the substantive nature of proposed ballot measures, and that a ballot must not be misleading.

The proposed ballot language is not transparent because, among other reasons, it does not inform the voters of the specific form of manager structure to be implemented. As each specific form of manager structure has its benefits and detriments, voters need to know what form of structure is being proposed, so they can assess whether the change is better or worse than the County's current form of government. Moreover, hidden within the measure are several important changes that need to be pointed out to the voters. Among these are that the measure provides the Council new powers. Currently, the Council does not have the ability to specify the powers of the mayor/manager and how the mayor/manager will be selected and removed, as these are matters addressed in the Charter. Further, the measure removes the voters' ability to remove the mayor/manager by impeachment, since the proposed language gives the Council the power to determine how the mayor/manager will be removed. There are numerous other effects on voters not apparent from the proposed language. Indeed, until the Council decides the powers and duties of the manager and the manner in which he/she will be selected and removed, the effects of the measure will not be known. Thus, the proposed measure fails the test for transparency.

As long as the Commission does not have a specific manager proposal, it will have difficulty meeting the test for transparency. Examples of specific proposals are:

- a. Text: Section 7.01. Election and Term of Office. [The electors of the county shall elect] The council shall appoint a mayor whose term of office shall be four years beginning at twelve o'clock meridian on the first working day of December following his election. No person shall serve as mayor for more than two consecutive full terms.

Ballot language: Shall the mayor be appointed by the council instead of elected?

- b. Text: Section 7.01. Election and Term of Office. [The electors of the county shall elect a mayor whose] The chair of the council shall serve as mayor. The mayor's term of office shall be four years beginning at twelve o'clock meridian on the first working day of December following his election. No person shall serve as mayor for more than two consecutive full terms.

Ballot language: Shall the elected mayor be replaced by the council chair?

2. Lack of legislative equivalency – The principle of legislative equivalency requires that a measure can only be modified by a legislative act of equal dignity and import. See, Matter of Gallagher v. Regan, 42 N.Y.2d, 366 N.E.2d 804 (1977)(position created by charter cannot be abolished by ordinance); Fasi v. City Council of the City & County of Honolulu, 72 Haw. 513 (1992)(ordinance cannot conflict with or exceed the charter). As stated above, Charter section 7.01 requires an elected mayor. Therefore, the council cannot change that selection process by ordinance.
3. Violation of Charter section 24.03.A. – Charter section 24.03.A. requires separate voting for each amendment to the charter proposed by the Charter Commission (unless a new charter is submitted by the Charter Commission ). The purposes of a requirement for separate voting are (1) to prevent imposition upon or deceit of the public by the presentation of a proposal which is misleading or the effect of which is concealed or not readily understandable, and (2) to afford the voters freedom of choice and prevent “logrolling”, or the combining of unrelated proposals in order to secure approval by appealing to different groups which will support the entire proposal in order to secure some part of it although perhaps disapproving of other parts. In re Initiative Petition No. 344, State Question No. 630, 797 P.2d 326, 1990 OK 75 (1990).

As stated under item 1. (“Lack of transparency”), above, the effect of the measure may not be readily understandable, since it does not contain a manager proposal that allows the voters to compare the benefits of the proposal to the current situation. The proposed measure also “logrolls.” For example, it appeals to persons who favor a county manager system as well as persons who support the expansion of council powers. However, it does not provide an option to voters who support the county manager concept but oppose the expansion of council powers.